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CRIMINAL LAW ISSUES

STEPHENSON v. STATE, 87S00-9605-DP-398, ___ N.E.2d ___ (Ind. Jan. 25, 2001).
SULLIVAN, J.

Like other members of the jury, jury foreman Michael Fox took notes in open court of his daily observations of the trial without objection from defense counsel. Then in the evenings, Fox took his courtroom notes home with him and typed a narrative version of the trial on his personal computer. By the end of the trial, Juror Fox had prepared a 430-page typed notebook [footnote omitted] □□supplemented with a 50-page timeline marking the sequence of events. When it came time for jury deliberation, Fox took the notebook into the jury room and relied on it a few times. Fox also discussed some of the notebook's contents with other jurors but none of the jurors actually read the notebook themselves.

. . . .

It is now well-settled Indiana law that jurors are permitted to take notes during the course of a trial subject to the discretion of the trial court and its duty to ensure that jurors pay attention to all the evidence in the case. [Citations omitted.] This Court has further determined that a juror who records notes at home is a "closely related matter"; to a juror who takes notes in the courtroom so long as no "communication to or from another person"; has occurred. Gann v. State, 263 Ind. 297, 300-1, 330 N.E.2d 88, 91 (1975). Thus, we have determined that both circumstances – taking notes during trial and transcribing notes at home – are appropriate provided that the juror pays attention to the evidence presented during trial and does not seek out any outside or extrinsic influences aimed to taint the notes.

. . . [T]here is no evidence demonstrating that Fox himself was exposed to extrinsic or outside influences, such as reading newspaper articles, watching a television program, researching on the Internet, or "communicating to or from another person" while compiling the notebook at home. At a post-trial hearing on the matter, Juror Fox testified that because he was "under Court order not to watch T.V. – local T.V., radio, or read the newspaper" he "sat at the computer" all evening typing his notes. [Citation to Record omitted.] . . .[13]

Without any evidence of extrinsic influence on Juror Fox during the course of the trial, we think that when he brought the notebook into jury deliberations, the contents of it were like those of any other juror-made notebook in this case – a reflection of a juror's personal observations of the trial, thoughts, and mental processes. . . .

. . . .

[13] The trial court held a post-trial hearing concerning Juror Fox's notebook. Fox testified before the court and explained that after the trial had ended, he explored the circumstances surrounding the case by reading newspaper articles and interviewing officers who testified at trial. Fox stated that while pursuing his research on the case, he had destroyed "more than half" of the original notebook by updating and revising the

notebook. Fox testified that he did not have a copy of the original notebook on file, saved on a floppy disk, or saved on his computer hard-drive. Because the original notebook could not be produced or re-produced at the post-trial hearing, the notebook admitted at the trial level and reviewed by this Court is not the same notebook taken into jury deliberation.

The making of a lengthy notebook, especially where Defendant claimed no error to with respect to the note taking of other jurors, did not constitute gross misconduct or irregularity on the part of Juror Fox.

Defendant also contends that Fox's notebook was tantamount to an "unofficial transcript[]"; wrongfully brought into the jury room, and that the notebook resembled a "pseudo exhibit," which like other exhibits, should have been withheld from the jurors. [Citation to Brief omitted.] Defendant also argues that the notebook amounted to "evidence" not supported by the record and that he did not have the opportunity to test the reliability and accuracy of the notebook's content. [Citation to Record omitted.] We reject this argument for the same reasons set forth supra. A juror's notes, typed or handwritten, organized or not, reflect the juror's own mental process and personal observations of the testimony and other evidence presented at trial. A juror's view of a case is not "evidence", does not function as an exhibit, and is not comparable to an unofficial transcript.

Finally, we find there is no evidence in the record that Juror Fox used the notebook inappropriately during deliberation. . . .

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

SIVELS v. STATE, No. 49S00-9908-CR-455, ___ N.E.2d ___ (Ind. Jan. 29, 2001).

SHEPARD, C. J.

Four juries have assembled in the murder prosecution of appellant Collis Sivels. The first was dismissed after the court granted a continuance. Two successive juries were unable to agree on a verdict. Sivels contends that the fourth prosecution, which resulted in his conviction, violated his due process rights under both the Fourteenth Amendment of the U.S. Constitution and Article I, Section 12 of the Indiana Constitution, . . . [.]

In analyzing Sivels' claims, we examine the authority of a trial court to dismiss an information and end prosecution after prior attempts to convict a defendant resulted in hung juries.

. . . .

The State . . . urges that no authority exists for a trial court to "step into the shoes of the prosecutor and dismiss an indictment following a hung jury . . . ." [Citation to Brief omitted.] . . .

At the hearing on the motion to dismiss, the trial court concluded that it "ha[d] inherent jurisdiction to limit prosecutions, because at some point it gets to be unreasonable." [Citation to Record omitted.] We agree.

A survey of courts in several jurisdictions provides strong support for the proposition that a trial court has inherent authority to dismiss an information or indictment with prejudice where multiple mistrials caused by hung juries infringed on the defendant's right to fundamental fairness.

. . . .

Caselaw from elsewhere suggests that "the trial court must generally defer to the prosecutor's decision to retry the case, but if fundamental fairness compels dismissal, the court is authorized to do so." [Citations omitted.] In determining whether fundamental fairness compels dismissal, a trial court must balance "two basic rights: a defendant's right to a fair trial and the State's right to seek a verdict on validly prosecuted charges." [Citation omitted.]

The Vermont Supreme Court has identified various factors that a trial court should weigh when striking this balance. Justice Denise Johnson's opinion listed the following factors:

> (1) the seriousness and circumstances of the charged offense; (2) the extent of harm resulting from the offense; (3) the evidence of guilt and its admissibility at trial; (4) the likelihood of new or additional evidence at trial or retrial; (5) the defendant's history, character, and condition; (6) the length of any pretrial incarceration or any incarceration for related or similar offenses; (7) the purpose and effect of imposing a sentence authorized by the offense; (8) the impact of dismissal on public confidence in the judicial system or on the safety and welfare of the community in the event the defendant is guilty; (9) the existence of any misconduct by law enforcement personnel in the investigation, arrest, or prosecution of the defendant; (10) the existence of any prejudice to defendant as the result of passage of time; (11) the attitude of the complainant or victim with respect to dismissal of the case; and (12) any other relevant fact indicating that judgment of conviction would serve no useful purpose.

State v. Sauve, 666 A.2d [1164 (Vt. 1995] at 1168 . . . The New Jersey court identified some other relevant considerations: "(1) the number of prior mistrials and the outcome of the juries' deliberations, as known; and ([2]) the trial court's own evaluation of the relative strength of each party's case . . . ." State v. Abbatti, 493 A.2d [513 N. J. 1985] at 521-22.

We think these factors, or such of them as appear relevant in a given case, form an appropriate basis for determining whether to dismiss a defendant's information after multiple prosecutions caused by mistrials. . . . Accordingly, abuse of discretion is the appropriate standard for appellate review of a trial court's decision to dismiss or retry a prosecution previously mistried due to hung juries. [Footnote omitted.]

. . . .

At the time Sivels filed a motion for dismissal of his murder charge, he had encountered two mistrials. Sivels' counsel was advised that the first mistrial resulted after seven jurors voted for acquittal and five voted for conviction. The second mistrial resulted after nine jurors voted for acquittal and three voted for conviction. [Footnote omitted.]

Sivels remained incarcerated without bond for two and a half years before his final trial. During that time, as a result of the trial on June 1, 1998, he was acquitted on two of his charged offenses, felony murder and robbery.

At the hearing on the motion to dismiss, the prosecutor indicated his desire to retry the case. [Footnote omitted.] At the conclusion of the hearing, the trial court indicated its own evaluation of the relative strength of the State's case and its belief that Sivels committed the crime charged. At the last retrial, the State had newly available eyewitness testimony by Adams that Sivels murdered the victim. The trial resulted in a conviction.

Upon consideration of these relevant factors, the balance between Sivels' right to fundamental fairness and the State's right to seek a verdict on validly prosecuted charges swings in favor of the State. The trial court did not abuse its discretion by allowing the State to retry the case.

BOEHM, DICKSON, SULLIVAN, and RUCKER, JJ., concurred.

McCANN v. STATE, No.49A05-0002-CR-43, ___ N.E.2d ___ (Ind. Ct. App. Jan. 26, 2001).

BAILEY, J.

Here, during final instructions, and over McCann's objection, the trial court read the following Attempted Rape instruction:

> A person attempts to commit a crime when he knowlingly engages in conduct that constitutes a substantial step toward the commission of the crime.
>
> The crime of Rape is defined by statute as follows:
>
> A person who knowingly has sexual intercourse with a member of the opposite sex when the other person is compelled by force or

imminent threat of force commits rape. The offense is a Class A felony if it is committed while armed with a deadly weapon.

The elements of this offense are that the Defendant must:

1. Knowingly
2. Have sexual intercourse
3. With a member of the opposite sex
4. By compelling the other person with force or the imminent threat of force
5. While armed with a deadly weapon.

. . .

. . . Our supreme court addressed the adequacy of the Attempted Battery instruction against the backdrop of Spradlin v. State, in which our supreme court held that an attempted murder instruction "must inform the jury that the State must prove beyond a reasonable doubt that the defendant, *with intent to kill* the victim, engaged in conduct which was a substantial step toward such killing." 569 N.E.2d 948, 950 (Ind. 1991) (emphasis added). In Richeson, [v. State, 704 N.E.2d 1008 (Ind. 1998)] our supreme court held as follows:

> We conclude that the special precautions we took in Spradlin are not warranted for lesser offenses. We hold, therefore, that the attempt statute permits an instruction that the jury may convict upon proof that the defendant took a substantial step toward a *knowing* battery.

Richeson, 704 N.E.2d at 1011. Accordingly, the supreme court affirmed the defendant's conviction for Attempted Burglary. The Attempted Rape instruction given in this case dictates the same result, as it neither misstated the law nor misled the jury.

. . . .

[T]he trial court gives a summary of the facts of the crimes and notes that A. L. was pregnant at the time McCann attempted to rape her. The trial court's summary merely tracks several of the elements of the crimes charged, and as such may not be used to enhance McCann's sentence. Moreover, we are unaware of Indiana precedent that would cause A. L.'s state of pregnancy, *as a fact apparently unknown to McCann*, to be a proper aggravating circumstance. Cf. Whitehead v. State, 511 N.E.2d 284, 297 (Ind. 1987) cert. denied (considering a trial court's finding that there was "no excuse or provocation which would justify Appellant's attack on a woman five months pregnant" in its determination that a sentence was not manifestly unreasonable.) From the Record, we are unable to discern the stage of A. L.'s pregnancy at the time of McCann's offenses, and therefore we are unable to infer McCann's knowledge of such pregnancy, an inference seemingly made, and accepted as a proper aggravator, by our supreme court in Whitehead.

. . . .

SULLIVAN, J., filed a separate written opinion in which he concurred, in part, and in which he dissented, in part, as follows:

The majority relies upon Richeson v. State (1998) Ind., 704 N.E.2d 1008, in holding that the jury need not be instructed in an attempted rape case that the defendant have the intent to accomplish the crime of rape. To be sure, Richeson does state that "we expressly limit *Spradlin* to attempted murder." Id. at 1010. This is not to say, however, that the holding of Richeson is applicable to all attempt crimes except attempted murder. As a matter of fact, even in the factual setting of Richeson, an attempted battery case which could not have resulted in a conviction of any greater than a Class B felony, the court noted that the requisite *mens rea,* i.e., knowingly or intentionally, must be applied "to the attempted result, the battery itself" rather than to the substantial step. [Citation omitted.] In other words, in the context of the case before us, Richeson requires that the jury be informed that the defendant must have intended to achieve a knowing or intentional rape.

. . . .

The Richeson court went to great pains to note that the attempted murder conviction involved in Spradlin subjected the defendant to a "penalty that is two and one-half to *fifty times* higher than the penalty for attempted battery." Id. at 1011 (Emphasis in original). It is imperative to note that the attempted rape conviction here involved is a Class A felony and in this regard, is identical to the attempted murder conviction of Spradlin.

Therefore, while bound by the statement in Richeson that Spradlin is limited to attempted murder cases, Richeson does not preclude this court from applying an analogous principle, perhaps drawn from the wisdom of Spradlin, to cases substantially similar in consequence. [Footnote omitted.] I would apply a principle analogous to that of Spradlin to cases which by instructions to the jury are likely to be confusing with respect to mens rea and intent and which involve a penalty for a Class A felony. This is such a case and for that reason I would reverse the attempted rape conviction and remand for a new trial upon that charge.

VAIDIK, J., filed a separate written opinion in which she concurred, in part, and in which she dissented, in part, as follows:

I agree with the majority opinion in all respects, except sentencing. . . .

[I] do not agree with the majority that an attempted rape victim's pregnancy may not be used as an aggravating circumstance when the record is unclear as to whether or not the defendant knew of her condition. . . .

. . . .

The majority maintains that in *Whitehead v. State*, 511 N.E.2d 284 (Ind. 1987), *cert. denied*, our supreme court inferred that a victim's pregnancy must be known to a defendant before it is appropriate to use her pregnancy as an aggravating circumstance. I cannot agree. Rather, the supreme court merely provided that it was appropriate for a trial court to find "no excuse or provocation which would justify [the defendant's] attack on a woman five months pregnant." *Whitehead*, 511 N.E.2d at 296. I do not read the same inference into the supreme court's statement as the majority apparently does.

Second, I disagree with the majority when it remands this case to the trial court for re-sentencing. Even if the victim's pregnancy is not a proper aggravating circumstance, the majority concedes that there were two valid aggravators. A single aggravator is sufficient to support a sentence. [Citation omitted.] . . . Here, given the three proper aggravators, the lack of any mitigating factors, and the heinous nature of this crime, I would affirm the trial court's sentence.

PHELPS v. STATE, No. 49A04-0003-PC-00113, ___ N.E.2d ___ (Ind. Ct. App. Jan. 31, 2001).

VAIDIK, J.

[A]ccording to Phelps, the jury did not have knowledge of the contents of the documents and was without sufficient evidence to adjudicate him to be an habitual offender. . . .

Phelps admits that the trial court properly admitted State's Exhibits 27, 28 and 29. Our review of the record reveals that the trial court told the prosecutor to read the exhibits to the jury. Phelps complains that there is nothing in the record to indicate that the prosecutor followed the trial court's instructions.

. . . .

[B]ased upon the record before us, it appears that the trier of fact was free to consider Exhibits 27, 28 and 29 in making its findings. The documents were properly admitted into evidence, and the trial court told the prosecutor to read them to the jury. Under these circumstances, we presume that the jury heard the evidence, and Phelps has the burden of coming forward with evidence to rebut this presumption. This he has failed to do.

The dissent cites *Fout v. State,* 619 N.E.2d 311 (Ind. Ct. App. 1993) and *Carey v. State*, 180 Ind. App. 516, 389 N.E.2d 357 (1979), to support its conclusion that where the record does not provide that the jury received an exhibit, we must presume that the jury did not. In *Fout*, "[n]othing in the record clearly establishe[d] that the jury was ever shown [the exhibit]." *Id.* at 313. Here, however, the record establishes that the exhibits were properly admitted into evidence, and the trial court told the prosecutor to read them to the jury. In *Carey*, the issue was whether an affidavit was properly admitted into evidence. Here, there is no question that the exhibits were properly admitted. The facts of *Fout* and *Carey* are therefore distinguishable from those before us.

. . . .

BAKER, J., concurred.

SHARPNACK, C. J., filed a separate written opinion in which he dissented, in part, ans follows:

I agree with the majority that the record does not indicate whether the prosecutor read those exhibits to the jury per the trial court's request, but I do not agree that we may presume that the prosecutor did so. I conclude that where the record does not provide that the jury received an exhibit, we must presume that the jury did not. [Citations omitted.] Consequently, in this case the jury neither saw the exhibits not had their contents read to it. Therefore, it was presented with no evidence upon which to convict Phelps, and his habitual offender conviction is not supported by sufficient evidence. [Citation omitted.]

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